

From: Jeff Erwin
To: Microsoft ATR
Date: 1/2/02 4:19pm
Subject: MICROSOFT SETTLEMENT

According to Tom Reilly, one of the 10 state attorneys general who have broken with the Justice Department to offer their own remedies in the antitrust case of the decade, their proposed fix is designed to "end Microsoft's stranglehold on innovation and competition in the personal computer industry."

If you actually read the proposals, though, a very different message comes through loud and clear: The state AGs want to turn Microsoft into a regulated public utility, with about as much freedom to innovate as the Minsk Post Office. Indeed, the proposal looks like something Oracle, Sun Microsystems and AOL Time Warner dreamed up to do to Microsoft--something none of them have managed in the marketplace.

Thomas Penfield Jackson, the judge in the antitrust trial, was inclined to break up Microsoft and scatter the pieces to the wind. What Microsoft haters love to forget is that the federal appeals court reviewing the verdict came to very different conclusions. It jettisoned two out of three of Judge Jackson's findings of liability and trimmed the third substantially.

Justice Department litigators, anxious to hold as much turf as they could but realistic about the import of the unanimous appeals court decision, subsequently negotiated a settlement that addressed every element of liability--and then some.

But half the state AGs, who had piggybacked on the Justice Department case and grown fond of their self-appointed role as David to Bill Gates' Goliath, apparently saw no problem in pretending that Judge Jackson's verdict stood.

You think I'm exaggerating? Consider what the AGs have proposed.

They want Microsoft to strip Windows down to its skivvies and then sell the operating system in every possible state of dress: with browser or without, with media player or without, with e-mail functionality or without, and so forth. And they want to set the prices Microsoft charges for this OS according to somebody's reckoning of how much the company spent to create each feature.

All this in spite of the fact that the appeals court explicitly stated that the burden of proof was on the government to show that the costs of integrating new features into the operating system, as measured by a reduction in competition, exceeded the benefits to consumers in terms of improved functionality.

The plan would effectively Balkanize Windows, making it impossible for independent software developers to use any of the newly optional features in the operating system without incurring the wrath of customers who inadvertently bought the wrong version of Windows.

Remember Microsoft's dispute with Sun over the purity of Microsoft's version of Java? Microsoft settled a private suit with Sun in January 2001 by agreeing to stop the development of its own versions of Java. Yet the states would require Microsoft to include Java with every copy of Windows, effectively making it a common carrier for Sun on the order of a pipeline that must deliver other companies' oil.

Then there's the small matter of disclosing trade secrets. The antitrust case, of course, was about operating systems--Microsoft's applications software was barely mentioned. Yet the states are demanding that Microsoft license three other companies to produce versions of its Office applications suite for competing platforms. Microsoft would have to provide the Office source code to licensees, and much of the Windows source code as well, since Office needs Windows APIs.

Did I mention oversight? The Justice Department proposal would create a technical committee with authority to advise the court on enforcement issues. The states want to create a special master, who would effectively have veto power over Microsoft's design and marketing decisions.

The chances are excellent that the state AG's horror show will never make it to Broadway. The new judge in the case--Judge Jackson, you'll recall--was fired for ethical lapses.

But thanks to the states' initiative, the case will drag on, and the state AGs will earn more brownie points from Microsoft's competitors. Who, apart from consumers of software and believers in a prudent, consumer-oriented antitrust policy, could ask for anything more?

Leonard Orland is a professor at the University of Connecticut Law School. This was an article he wrote on December 21st which succinctly addressed the real issues in this case.

Jeff Erwin

General Manager

Network Management Group

Management Business Group

Microsoft Corporation

(425) 705-9400